

No. 11046

United States
Circuit Court of Appeals
For the Ninth Circuit.

ESTATE OF ETHEL M. DuVAL, Deceased, by
Thomas M. Robinson, Jr., and Weston Shattuck
Robinson, as Executors of her last will and
testament,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

JUN 12 1945

PAUL P. O'BRIEN,
CLERK

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ARTICLE

OF THE

CONSTITUTION OF THE UNITED STATES

OF 1787

ARTICLE

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	18
Appearances	1
Certificate of Clerk to Transcript of Record..	70
Docket Entries	1
Decision	30
Designation for Record on Review and State- ment of Points, Respondent's (CCA).....	71
Designation of Record on Review, Petitioner's	68
Findings of Fact	20
Opinion	25
Notice of Filing of Petition for Review.....	39
Petition for Redetermination of Deficiency ...	3
Exhibit A—Statement of Deficiency	12
Petition for Review by the United States Cir- cuit Court of Appeals for the Ninth Circuit of a Decision by the United States Tax Court	31
Proceedings	40
Exhibit for the Petitioner:	
8—Will of Ethel M. DuVal, April 17, 1942	58

Exhibit for the Respondent:

B—Letter, March 17, 1943, Mr. Dob- zensky from A. E. Caldwell.....	57
---	----

Witnesses for the Petitioner:

Dobzensky, M. W.	
—direct	50
—cross	54

Kattrelle, R. W.	
—direct	41, 46

Robinson, Thomas M., Jr.	
—direct	40

Statement of Points	37
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APPEARANCES

For Taxpayer:

M. W. DOBRZENSKY, Esq.,
JAMES H. ANGLIM, Esq.

For Comm'r:

ARTHUR L. MURRAY, Esq.,

Docket No. 4731

THOMAS M. ROBINSON, JR., and WESTON SHATTUCK ROBINSON, as Executors of the last will and testament of ETHEL M. DuVAL, Deceased, (Amended Title) ESTATE OF ETHEL M. DuVAL, Dec'd., by Thomas M. Robinson, Jr., and Weston Shattuck Robinson as Executors of her last will and Testament. Order of 5/17/44.

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1944

- May 1—Petition received and filed. Taxpayer notified. Fee paid.
- May 1—Request for Circuit hearing in San Francisco filed by taxpayer. 5/5/44 granted.
- May 5—Copy of petition served on General Counsel.

1944

May 12—Motion to amend caption of petition filed by taxpayer.

May 17—Order that the caption of the proceeding at the above docket number be amended to read "Estate of Ethel M. DuVal, Dec'd., by Thomas M. Robinson, Jr., and Weston Shattuck Robinson, as Executors of her last will and testament, entered.

May 30—Answer filed by General Counsel.

June 3—Copy of answer served on taxpayer. San Francisco, Calif.

Aug. 10—Hearing set Sept. 18, 1944, at San Francisco, Calif.

Sep. 18—Hearing had before Judge Van Fossan on the merits. Submitted. Appearance of James H. Anglin, Esq., filed. Briefs due Oct. 18, 1944—replies Nov. 7, 1944.

Oct. 14—Transcript of hearing of 9/18/44 filed.

Oct. 16—Brief filed by taxpayer.

Oct. 16—Brief filed by General Counsel. Copy served 10/16/44.

Nov. 2—Reply brief filed by General Counsel.

Nov. 3—Reply brief filed by taxpayer. 11/3/44 copy served.

1945

Feb. 2—Findings of fact and Opinion rendered. Van Fossan, J. Decision will be entered for the respondent. Copies served.

Feb. 3—Decision entered, Van Fossan J. Div. 9.

Mar. 23—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

1945

Mar. 23—Proof of service filed. (Petition for review, statement and praecipe).

Mar. 23—Statement of points, with proof of service thereon filed by taxpayer.

Mar. 23—Praecipe filed. [1*]

The Tax Court of the United States

Docket No. 4731

THOMAS M. ROBINSON, JR., and WESTON
SHATTUCK ROBINSON, as Executors of
the last will and testament of ETHEL M.
DuVAL, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by Respondent in his notice of deficiency dated February 23, 1944 (IRA:ET:90-D-WCW) and as a basis of their proceeding allege:

I. (1) Ethel M. DuVal was a resident of the County of Alameda, State of California, and died therein on April 9, 1942.

*Page numbering appearing at top of page of original certified Transcript of Record.

(2) Your petitioners are the duly appointed qualified and acting Executors of the last will and testament of said decedent which was admitted to probate by the Superior Court of the State of California, in and for the County of Alameda, Proceeding No. 80585.

(3) Petitioners duly filed with the Collector of Internal Revenue for the First District of California, a Federal Estate Tax return for the estate of said decedent, paying thereon a Federal Estate tax of \$15,596.28.

(4) Thereafter, the Internal Revenue Agent in Charge at San Francisco, California, notified your petitioners of his [2] intent to adjust the Federal Estate tax liability of said estate by disallowing as a deduction from the gross estate, item 17 of Schedule K of the estate's Federal Estate Tax Return, a probate claim in the sum of \$175,000.00.

(5) Thereafter, petitioners protested said proposed deficiency in the sum of \$48,214.31. The protest was denied.

(6) On February 23, 1944, the Respondent, by said Internal Revenue Agent in Charge, advised petitioners by registered letter dated February 23, 1944, that his determination of the estate tax liability of the estate of said decedent disclosed a deficiency of \$48,214.31. A copy of said letter and notice of deficiency is annexed hereto, made a part hereof and marked Exhibit "A".

(7) This petition is filed for the purpose of obtaining a redetermination of said deficiency.

II. The following is a specification of each and

every error which petitioners allege have been committed by respondent:

(1) Respondent erred in failing and refusing to recognize that under the laws of the State of California, the jurisdiction in which the estate of said decedent is being administered and in which these transactions took place, decedent in her lifetime had incurred, and at the date of her death had, a direct, immediate and unconditional personal liability and obligation to Bank of America National Trust & Savings Association upon her endorsements and guarantees of the notes of M. K. Blake Estate Co. in the sum of \$175,000.00. [3]

(2) Respondent has disregarded the provisions of the law of California under which the \$175,000.00 probate claim is allowed and allowable as a claim against the estate of said decedent.

(3) Respondent asserts that the claim should be disallowed

(a) because the maker of the notes is solvent;

(b) because the co-guarantor and co-endorser is solvent;

(c) because no part of the claim has been paid;

(d) because it has not been shown that the estate of said decedent will ever be required to pay any amount in satisfaction of said claim;

whereas, Section 812(b)(3) of the Internal Revenue Code authorizes a deduction for "claims against the estate" of such amounts "as are allowed by the laws of the jurisdiction * * * under

which the estate is being administered” and does not preclude the deduction of the claim because of the four items above specified, or because of any of them.

(4) Respondent erred in that he asserts that the claim for \$175,000.00 should be disallowed under Section 812(b)(3) of the Internal Revenue Code “since the estate need suffer no loss because of any payment required to be made by the executors would immediately be compensated by the accompanying rights of subrogation from the other endorser and guarantor”, whereas, under the law of California, there is no liability on the part of either the maker of the note guaranteed to reimburse the guarantor or on the part of the co-guarantor to contribute to the guarantor unless and until he has been compelled to pay the debt and accordingly, [4] as of the date of decedent’s death, there was no right to “immediately be compensated” or otherwise by alleged accompanying rights of subrogation or contribution susceptible of evaluation in terms of money as of the date of decedent’s death.

(5) Respondent has erred in holding that since the claim has not been paid and may not be paid it should be disallowed, whereas the right to deduct a claim against the estate allowable under the laws of the jurisdiction in which decedent’s estate is being administered, under the Federal Estate Tax Law is not conditioned upon payment of the claim.

(6) Respondent has erred by asserting a discretion on his part to disallow the claim on asserted general rules of law, or, on the basis of al-

leged equitable considerations, whereas the petitioners' right to deduct the claim for Federal Estate Tax purposes is a matter of statutory right under Section 812(b) of the Internal Revenue Code and is not dependent on any basis of equity or upon any general rules of law.

(7) Respondent has failed and refused to recognize that the claim which he has disallowed is based on the personal liability of the decedent existing as of the time of her death and prior thereto and is one allowed by the laws of California, the jurisdiction in which the estate of said decedent is being administered.

(8) Respondent erred in disallowing the said claim for \$175,000.00.

III. The following is a statement of the facts relied upon by the petitioners as sustaining the aforesaid assignment of errors: [5]

(1) The M. K. Blake Estate Company is a California corporation and decedent was a shareholder thereof.

(2) On August 17, 1937, said corporation borrowed from Bank of America National Trust & Savings Association at Oakland, California, the sum of \$162,000, evidenced by the makers' promissory note of even date therewith and which said note was secured by the makers' deed of trust of even date therewith.

(3) At the time said note was executed and delivered and as a part of the same transaction and at the request of said Bank the decedent joined in the execution of the following contract endorsed on the back of said note:

“For value received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof and I hereby Waive Presentment, Demand, Protest, Notice of Protest and Notice of Nonpayment.

ETHEL M. DuVAL

MARY J. ROBINSON”

(4) On November 2, 1941, said M. K. Blake Estate Company borrowed the further sum of \$20,000 from said Bank, which said note is secured by the same deed of trust referred to in paragraph (2) hereof.

(5) At the time said \$20,000 note was executed and delivered and as a part of the same transaction and at the request of said Bank, the decedent joined in the execution of the following contract endorsed on the back of said note:

“For Value Received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof and all taxes and [6] insurance premiums and any other sums that may become due and payable under and by virtue of the provisions of the deed of trust (or mortgage) securing the aforesaid note, and I hereby Waive Presentment, Demand, Protest, Notice of Protest and Notice of Non-Payment.

I also hereby waive (a) the right, if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the maker to the holder, howsoever arising, shall have been paid; (b)

the right to require the holder to proceed against the maker, or to pursue any other remedy in the holders' power; and agree that the holder may proceed against the undersigned directly or independently of the maker, and that cessation liability of the maker for any reason other than payment, any extension, forbearance, change of rate of interest or acceptance, release or substitution of security or any impairment or suspension of the holders' remedies or rights against the maker, shall not in anywise affect the liability of the undersigned hereunder.

MARY J. ROBINSON
ETHEL M. DuVAL"

(6) The unpaid balance of the principal sum of said notes on the date of decedent's death was the sum of \$175,000.00.

(7) Ethel M. Du Val, said decedent, was a resident of Alameda County, California, at the time of her death on April 9, 1942. Thereafter such proceedings were had in the Superior Court of the State of California, in and for the County of Alameda in a proceeding therein entitled "In the Matter of the Estate of Ethel M. DuVal, deceased", No. 80585 and that letters testamentary upon the will of said decedent were issued out of said court by the Clerk and under the seal thereof to your petitioners above named who thereupon became, ever since have been and now are the [7] executors of the last will and testament of said decedent. The administration of the estate of said decedent has

been pending in said court since the death of said decedent and is now pending therein.

(8) Bank of America National Trust & Savings Association, holder of said notes, endorsed and guaranteed by said decedent, as above set forth, filed its verified claim in the sum of \$175,000 against the estate of said decedent, which is a probate proceeding pending in the Superior Court of the State of California, in and for the County of Alameda, State of California, No. 80585 in the files and records of said Court. Said claim was delivered to the executors and filed with the Court within the time allowed for presenting claims and was allowed in writing by the executors for the full amount thereof and was presented by the executors to the Judge of said Court for approval who endorsed his approval thereon in the full amount of said claim and said claim as so allowed and approved was filed with the Clerk of said Court within thirty (30) days thereafter. Said claim was and is a claim allowed by the laws of California, the jurisdiction in which the estate of said decedent is being administered.

(9) On October 25, 1943, petitioners as such executors filed in said Court in said Probate Proceeding their first account and report of their administration, in which said account and report and in Schedule C thereof they reported to said Court the fact of the filing of said claim for \$175,000 on the contracts specified in paragraphs (3) and (5), supra, and reported said claim as an allowed and approved claim. On November 5, 1943, [8] said

court by its order settled and allowed and approved, said account and report.

(10) The said notes to which said endorsement and guarantee relate have not been paid nor has any part of the principal thereof been paid, except as hereinbefore stated.

(11) The amount of said claim in the sum of \$175,000, as allowed and approved by the executors and the court as aforesaid, was included as a deduction for Federal Estate Tax purposes as item 17 of Schedule K of the Federal Estate Tax return for the estate of said decedent, filed by petitioners.

(12) Respondent has disallowed said item of deduction in the sum of \$175,000, as shown in Exhibit "A" which is annexed hereto, and proposes to assess an additional Federal Estate Tax against the estate of said decedent in the sum of \$48,214.31.

(13) The law of California, as established by the statutes of that state and by the decisions of the courts thereof, being the laws of California, the jurisdiction under which the estate of said decedent is being administered and under which said claim is allowed and allowable and which are germane to the several matters set forth in this petition, is not pleaded herein for the reason that petitioners understand that since this Court takes judicial notice of such statutes and decisions, the same are not required to be pleaded.

Wherefore, petitioners pray that the Court may hear this petition and determine that petitioners are not liable for additional Federal Estate Tax, as asserted by Respondent, or [9] otherwise, or at all and that it be determined that said claim in the

sum of \$175,000.00 is a proper deduction from the gross estate of said decedent.

April 25, 1944.

M. W. DOBRZENSKY

Counsel for Petitioners. [10]

EXHIBIT A

(Copy)

SN-ET-1

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Feb. 23, 1944.

Office of
Internal Revenue Agent
in charge
San Francisco Division
IRA :ET-90-D
WCW

Estate of Ethel M. Du Val, Deceased
Thomas M. Robinson, Jr., and
Weston S. Robinson, Executors
c/o Fitzgerald, Abbott & Beardsley,
1516 Central Bank Building,
Oakland, California.

MT-ET-11904-First California

Estate of Ethel M. Du Val

Date of Death: April 9, 1942

Gentlemen:

You are advised that the determination of the estate tax liability of the above-named estate, discloses a deficiency of \$48,214.31, as shown in the

statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

HAROLD N. GRAVES,

Acting Commissioner,

(Signed) By R. L. SUTHERLAND

Acting Internal Revenue

Agent in Charge.

Enclosures:

Statement

Form of waiver [11]

ESTATE TAX

San Francisco

IRA:ET:90-D

WCW

MT-ET-11904-First California

Estate of Ethel M. Du Val

Date of Death: April 9, 1942

Statement

	Liability	Assessed	Deficiency
Estate Tax	\$62,516.50	\$14,302.19	\$48,214.31

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the protest dated December 15, 1943, and to statements made at a conference held January 17, 1944.

A copy of this letter and statement has been mailed to your representative, Mr. M. W. Dobrzensky, care of Fitzgerald, Abbott & Beardsley, 1516 Central Bank Building, Oakland, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Estate

Net estate for basic tax as disclosed by return.....\$ 15,596.28

Net estate for additional Tax as disclosed by return \$ 77,596.28

Additions to value of net estate and
decreases in deductions:

(a) Decreases in deductions, debts of
decendent, Item 17, Schedule K
of return\$175,000.00 175,000.00

Additions to value 0.00

Total.....\$252,596.28

Reductions in value of net estate and
increases in deductions:

(b) Error in Line 1, Schedule Q of return.....	2,000.00
Net estate for additional tax as adjusted.....	\$250,596.28
Net estate for basic tax as adjusted.....	\$190,596.28

[12]

Explanation of Adjustments

(a) Debts of decedent, Schedule K of return

Item 17—Bank of America

	Returned	Determined
N.T.&S.A.	\$175,000.00	\$ 0.00

On August 17, 1937 and November 2, 1941, the decedent and another had endorsed and guaranteed the payment of two notes upon which the M. K. Blake Estate Co., a corporation, was principally liable as maker. Said notes were secured by deed of trust upon real estate owned by the corporation and the unpaid balance upon the said notes of the corporation amounted to \$175,000.00 at date of decedent's death. The corporation had not defaulted upon the obligation and had a net worth over and above all liabilities of over \$650,000.00. The other accommodation endorser is also solvent. A claim for the full amount was filed against decedent's estate and said claim was allowed and approved by her executors and the probate court. No part of the claim for \$175,000.00 has been paid and it has not been shown that the estate of decedent will ever be required to pay any amount in satisfaction of such claim. It is held that the deduction claimed in the return is not an allowable deduction under

section 812(b)(3) of the Internal Revenue Code since the estate need suffer no loss because of any payment required to be made by the executors would immediately be compensated by the accompanying rights of subrogation against the corporation primarily liable and contribution from the other endorser and guarantor.

(b) Net Estate for the Additional Tax, Schedule Q of the return.

	Returned	Determined
Line 1, Gross Estate.....	\$302,207.48	\$300,207.48

The gross estate was erroneously stated in this schedule of the return as above set forth, resulting in an overstatement of the net estate of \$2,000.00. This error is corrected by substitution of the proper figure.

Computation of Estate Tax

	Returned	Determined
Gross estate for basic tax.....	\$300,207.48	\$300,207.48
Deductions for basic tax	284,611.20	109,611.20
Net estate for basic tax	\$ 15,596.28	\$190,596.28
Net estate for additional tax.....	\$ 77,596.28	\$250,596.28
		[13]
	Returned	Determined
Gross basic tax	\$ 4,217.89	
Credit for State inheritance, etc., taxes	3,374.31	
Net basic tax		\$ 843.58
Total gross taxes (basic & additional) \$	65,890.81	
Gross basic tax	4,217.89	
Net additional tax		61,672.92
Total tax payable		\$ 62,516.50

Estate tax assessed:

Original, April 1943 List, page 103, line 4—

First California District 14,302.19

Deficiency\$ 48,214.31

[14]

State of California,

County of Adameda—ss.

Thomas M. Robinson, Jr., and Weston Shattuck Robinson, each being duly sworn, for himself deposes and says: I am one of the petitioners named in the foregoing Petition, that is to say, I am one of the duly appointed, qualified and acting executors of the last will and testament of Ethel M. DuVal, deceased and as such have authority to act for her estate; that I have read the foregoing petition and am familiar with the statements contained therein and that the statements contained therein are true, except those stated to be on information and belief and that those he believes to be true.

THOMAS M. ROBINSON, Jr.

WESTON SHATTUCK ROBINSON

Subscribed and sworn to before me this 25th day of April, 1944.

[Seal]

CONSTANCE E. MULVANY

Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed T.C.U.S. May 1, 1944. [15]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners, admits and denies as follows:

I. (1) and (2) Admits the allegations contained in subparagraphs (1) and (2) of paragraph I of the petition.

(3) Admits that petitioners duly filed with the Collector of Internal Revenue for the First District of California, a Federal Estate Tax return for the estate of said decedent, but denies the remaining allegations contained in subparagraph (3) of paragraph I of the petition.

(4) Admits the allegations contained in subparagraph (4) of paragraph I of the petition. [16]

(5) Admits the allegations contained in subparagraph (5) of paragraph I of the petition.

(6) Admits the allegations contained in subparagraph (6) of paragraph I of the petition.

(7) Admits the allegations contained in subparagraph (7) of paragraph I of the petition.

II. (1) to (8), inclusive. Denies that the Commissioner erred in the determination of the deficiency, as alleged in subparagraphs (1) to (8), inclusive, of paragraph II of the petition.

III. (1) to (7), inclusive. Admits the allegations of fact contained in subparagraphs (1) to (7), inclusive, of paragraph III of the petition.

(8) and (9) For lack of information, denies the allegations contained in subparagraphs (8) and (9) of paragraph III of the petition.

(10) Admits the allegations contained in subparagraph (10) of paragraph III of the petition.

(11) Admits that the amount of said claim in the sum of \$175,000.00 was included as a deduction for Federal Estate Tax purposes as item 17 of Schedule K of the Federal Estate Tax return for the estate of said decedent, filed by petitioners, but denies the remaining allegations contained in subparagraph (11) of paragraph III of the petition. [17]

(12) Admits the allegations contained in subparagraph (12) of paragraph III of the petition.

(13) For lack of information, denies the allegations contained in subparagraph (13) of paragraph III of the petition.

IV. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioners' appeal denied.

(Signed) J. P. WENCHEL TMM

Chief Counsel, Bureau of In-
Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

Special Attorney, Bureau of
Internal Revenue.

TMM/vg 5-25-44

[Endorsed]: Filed T.C.U.S. May 30, 1944. [18]

[Title of Tax Court and Cause.]

4 T. C. No. 84

Promulgated February 2, 1945

Where a bank, owner of a claim against decedent as guarantor of notes, consents to distribution of the estate without payment of its claim, reserving, however, a claim against a co-guarantor, and where the estate will never be required to pay the claim.

Held, such claim is not deductible from the gross estate of decedent, although formally allowed by a court having jurisdiction of the settlement of the estate.

M. W. Dobrzensy, Esq., and James H. Anglim, Esq., for the petitioners.

Arthur L. Murray, Esq., for the respondent.

The respondent determined a deficiency in estate

tax of \$48,214.31 against the Estate of Ethel M. DuVal.

The single issue is whether the sum of \$175,000, representing the balance due on notes of a corporation, payment of which was guaranteed by the decedent and another, may be deducted from gross estate as a debt of the decedent, where the maker of the notes was financially able to [19] pay them.

FINDINGS OF FACT

Ethel M. DuVal, hereinafter referred to as the decedent, died testate on April 9, 1942, and at the time of her death, was a resident of Alameda County, California. The petitioners, Thomas M. Robinson, Jr. and Weston Shattuck Robinson, are the duly qualified and acting executors of the decedent's will, which was admitted to probate by the Superior Court of Alameda County. The estate tax return was filed by them on April 15, 1943, with the collector of internal revenue for the first district of California.

On August 17, 1937, the M. K. Blake Estate Co., hereinafter called the company, secured a loan from the Bank of America National Trust and Savings Association of Oakland, California, hereinafter called the bank, in the sum of \$162,000., payable three years thereafter, evidenced by the company's promissory note of the same date and secured by a deed of trust executed the same day.

At the same time, and at the bank's request, the decedent and her sister, Mary J. Robinson, endorsed the note as follows:

For value received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof and I hereby waive presentment, demand, protest, notice of protest and notice of nonpayment.

(Signed) ETHEL M. DuVAL

MARY J. ROBINSON

On November 2, 1941, the company borrowed from the bank an additional \$20,000, payable August 2, 1944, giving its promissory note therefor. The second obligation was also secured by the deed of trust above referred [20] to. The note was endorsed by the decedent and her sister in the following manner:

For value received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof and all taxes and insurance premiums and any other sums that may become due and payable under and by virtue of the provisions of the deed of trust (or mortgage) securing the aforesaid note, and I hereby waive presentment, demand, protest, notice of protest and notice of nonpayment.

I also hereby waive (a) the right, if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the maker to the holder, howsoever arising, shall have been paid; (b) the right to require the holder to proceed against the maker, or to pursue any other remedy in the holder's power; and agree that the holder may proceed against the undersigned

directly or independently of the maker, and that cessation of liability of the maker for any reason other than payment, any extension, forbearance, change of rate of interest or acceptance, release or substitution of security or any impairment or suspension of the holder's remedies or rights against the maker, shall not in anywise affect the liability of the undersigned hereunder.

At the time the above notes were executed and endorsed, the decedent and her sister, Mary J. Robinson, were the owners of a majority of the company's outstanding capital stock. The decedent was president of the company and Mary J. Robinson was its secretary.

On August 26, 1941, the company and the bank joined in an agreement extending the maturity date of the note for \$162,000 to August 2, 1944. The decedent and Mary J. Robinson gave their written consent to the extension.

At the decedent's death the unpaid balance of the principal of the two notes amounted to \$175,000. No part of this amount has been paid since her death. [21]

After the decedent's death the bank presented its claim for \$175,000 against her estate, said claim providing that it was made "by virtue of the guaranty of said deceased of two promissory notes of M. K. Blake Estate Co., a corporation, dated August 17, 1937, and November 2, 1941, respectively." The claim was delivered to the executors in June

1942 and allowed by them July 1942 for its full amount.

The decedent, by her will, created a residuary trust, naming M. W. Dobrzensky as trustee and as residuary devisee and legatee in trust. Shortly prior to March 15, 1943, a plan was agreed upon between the executors and their attorney (M. W. Dobrzensky) whereby the decedent's estate could be distributed. The plan provided that the entire estate should be distributed to the trustee subject to the payment of the bank's claim. This plan has never been carried out.

In response to a request by the trustee, Dobrzensky, the bank, on March 17, 1943, sent to him a "Consent to Distribution" providing that the bank "hereby consents to the distribution of the above entitled estate without payment of its claim, reserving, however, its claim against Mary J. Robinson, who, with said decedent, guaranteed said promissory note."

At the same time, the bank sent to the trustee a "Withdrawal of Request for Special Notice."

On April 7, 1943, the claim was approved by the Judge of the Superior Court of Alameda County, California.

On October 25, 1943, the executors of the decedent's will filed with the probate court their first account, in which they reported the [22] claim for \$175,000 as an allowed and approved claim. This account was approved by order of the court on November 5, 1943.

At the date of the decedent's death, and at all

times since, to the date of the hearing herein, both the maker of the notes, the M. K. Blake Estate Co., and the co-guarantor, Mary J. Robinson, have been solvent and fully able to pay the notes in question.

At Schedule K of the estate tax return the executors of the decedent's will claimed a deduction for the \$175,000 as a debt of the decedent. The respondent disallowed the deduction and determined the deficiency here in dispute.

OPINION

Van Fossan, Judge:

This case involves an alleged claim for \$175,000 against the estate of decedent. The deduction is sought under section 812(b) (3) of the Internal Revenue Code prior to its amendment by section 405 of the Revenue Act of 1942.¹

¹Sec. 812. Net Estate.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(b) Expenses, Losses, Indebtedness, and Taxes.
—Such amounts—

* * * *

(3) for claims against the estate,

* * * *

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the

The cited section allows a deduction for such claims against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered to the extent that they were contracted bona fide and for an adequate consideration in money or money's worth.

The so-called claim grew out of the transactions in which decedent and her sister guaranteed two notes of a corporation, of which decedent was president and the sister was secretary, and in which they owned a majority of the stock, the notes being held by a bank. The corporation and the surviving co-guarantor were both solvent and fully able to pay the amount of the claim at all material times. There has been no default on the notes or other event fixing the liability of the guarantor.

The bank's claim for \$175,000 was presented to the executors in June, 1942 and approved by them July 1, 1942. On March 17, 1943, the bank (owner of the claim) filed a written "consent to distribution" of the estate without payment of the notes, reserving, however, its claim against decedent's co-guarantor. On the same date the bank withdrew its request for special notice of proceedings in the above entitled estate. On April 7, 1943, the claim was approved by the Judge of the Superior Court of Alameda County, California. Although the consent to distribution was in the hands of petitioners'

estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

attorney at the time, whether or not the court was advised of the action of the bank in filing such a consent to distribution, does not appear. We deem this fact to be significant.

On this set of facts petitioners asks us to approve the claim as a deduction from the taxable estate and contends that it is wholly immaterial [24] that the claim will not be paid by the estate. They cite numerous cases in support, all of which we have examined. None of them involves a question of the fact of the existence of a bona fide claim. They involve the question whether a valid existing claim must be paid prior to deduction. Nor does any of them involve a consent to distribution or a waiver of rights, such as are here present. All such cases are distinguishable from the present case.

Not every claim which may be presented and allowed by the probate court will be allowed as a deduction under the cited section. Only claims which are enforceable against the estate may be deducted. *United States v. Mitchell*, 74 Fed. (2d) 571.

A claim is an assertion of a right. If there be no assertion of a right or if the right to assert has been relinquished or abandoned, there is no claim. Thus, if, in fact, there was no claim by the bank actually pending when the court purported to approve the claim, then the court's action was a nullity and without legal effect.

From the tenor of the "consent to distribution", especially its specific reservation of the claim against the co-guarantor, we conclude that as to

petitioners, the bank had abandoned its claim and relinquished its right. It follows that the purported approval of the claim by the court was a vain and ineffective action of no legal standing or binding effect. The consequence is that, for Federal tax purposes, there was no valid or bona fide claim outstanding on the part of the bank and no basis for a deduction from the gross estate.

That the approval of the petitioners' contention would lead to absurd [25] ends is readily to be seen if it be assumed that there were a third co-guarantor who had also died and whose estate was pressing a claim identical in all respects with petitioners'. The same facts would require, under petitioners' contention, that we approve as deductions from the estate two claims of \$175,000, neither of which will ever be paid. The statement of such a situation is its own refutation.

The view we take in the instant case makes unnecessary consideration in detail of the several contentions advanced by petitioners. The situation is even stronger for the Government than that before the court in *Buck v. Helvering*, 73 Fed. (2d) 760, where the court said:

* * * In view of this peculiar and unusual liability, a liability that in the case of a solvent and going corporation is not at all likely ever to be enforced where in practical effect the stockholders' liability is rather that of surety than that of a primary debtor, although as a matter of law the liability of the stockholder is primary, we hold that the payment by the cor-

poration of its indebtedness should be considered as satisfying the claim against the estate as of the date of the death of the deceased. If the debt of the corporation is paid by the corporation before it is paid by the stockholder, the liability of the stockholder is extinguished. For purposes of appraisement of the estate for the fixing of the Federal estate tax, the stockholders' liability should be considered as a potential claim rather than an actual claim, until it is paid by the estate or it is reasonably certain that it must be paid.

In the present case the liability does not attain to the dignity of a potential claim. In point of fact, there is no claim at all. The position of petitioners is much weaker than that present in *Charles H. Lay*, 40 B.T.A. 522, where we said:

Of course, if when decedent died, there had been indebtedness to [the creditor] for money borrowed by the decedent, the claim would have been deductible in full. [26] Doubtless, the Commissioner would not contend otherwise,

but where an estate is liable only as a surety or endorser, it cannot take any deduction because of such liability where the principal has ample assets to pay the indebtedness. Cf. *Buck v. Helvering*, supra; *Parrott v. Commissioner*, 30 Fed. (2d) 792.

Upon the facts presented, the respondent's determination is sustained.

Decision will be entered for the respondent. [27]

The Tax Court of the United States
Washington

Docket No. 4731

ESTATE OF ETHEL M. DuVAL, Deceased, by
THOMAS M. ROBINSON, JR., and WES-
TON SHATTUCK ROBINSON, as Executors
of her last will and testament,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as
set forth in its Findings of Fact and Opinion, pro-
mulgated February 2, 1945, it is

Ordered and Decided: That there is a deficiency
in estate tax of \$48,214.31.

(Signed ERNEST H. VAN FOSSMAN,
Judge.

Entered: Feb. 3, 1945. [28]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT OF A DE-
CISION BY THE UNITED STATES TAX
COURT

The petitioners in this cause hereby petition the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on February 3, 1945, 4 T. B. No. 84, determining deficiency in the petitioners' Federal Estate Tax in the sum of \$48,-214.31. This Petition for Review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

1.

JURISDICTION

Ethel M. DuVal was a resident of the County of Alameda, State of California, and died therein on April 9, 1942. The petitioners are the duly appointed, qualified and acting executors of the last will and testament of said decedent, which said will was admitted to probate by the Superior Court of the State of California, [29] in and for the County of Alameda, Proceeding No. 80585. The Federal Estate Tax return made on behalf of decedent's estate was filed with the Collector of Internal Revenue for the First District of California, whose

office is located at San Francisco, California, within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

2.

NATURE OF THE CONTROVERSY

This controversy involves the propriety of the deduction by the executors from the gross estate of the decedent of the claim of Bank of America National Trust and Savings Association in the sum of \$175,000.00, based upon a guaranty executed by decedent and her sister, of certain promissory notes of M. K. Blake Estate Company, a corporation, of which decedent and her sister were shareholders, the guaranties being required by the said lending bank.

Both guarantees under the California law are absolute and unconditional, (the guarantors expressly waiving presentment, demand, protest, notice of protest and notice of non-payment) and imposed direct, immediate and unconditional liability on decedent from the date of their execution.

The notes which were guaranteed were secured by a deed of trust on the property of the borrowing corporation. At the time of decedent's death the unpaid balance of the two notes was \$175,000.00.

The bank filed its claim in the estate proceedings in California within the time and in the manner prescribed by the Probate Law of California. This claim, based on the direct personal obligation [30] of decedent, was duly allowed by the executors, approved by the Court and filed.

The executors and their attorney (who was also the testamentary trustee named in decedent's will and to whom the entire residue of decedent's estate is distributable in trust under her will) agreed upon a plan of distribution for decedent's estate whereby it was to be distributed to the trustee, subject to the payment of the bank's claim. This plan remains in effect and the estate will be so distributed.

After this plan for distribution was agreed upon, the attorney and testamentary trustee telephoned to the Vice President of the bank whom he had known for twenty years. He told him that the estate could not be distributed without the bank's consent, once the claim was allowed and approved. He also told him of the plan to distribute the residue of the decedent's estate to the trustee in trust under decedent's will, subject to the bank's claim and asked him if the bank, "on that basis", would consent to the distribution of the estate without payment of the bank's claim.

The Vice President said that he believed that the bank would so consent and wrote the attorney the following day, stating that "in accordance with your request" he was enclosing a "Consent to Distribution" whereby the bank consented to the distribution of the estate without payment of its claim.

The executors filed their first account and report, reporting this claim as duly allowed and approved, whereupon, by operation of law, the claim became an acknowledged debt of the [31] estate, payable in due course of administration and uncontestable.

In the Federal Estate Tax return of the estate of said decedent, filed by petitioners, Item 17 of Schedule K thereof, petitioners included a deduction for this claim in the sum of \$175,000.

This was disallowed by the Internal Revenue Agent in Charge who by reason of the disallowance determined a proposed deficiency in the sum of \$48,214.31.

The Internal Revenue Agent in Charge in overruling the protest of the petitioners and assessing the additional tax, said, *inter alia*

“ * * * No part of the claim for \$175,000.00 has been paid and it has not been shown that the estate of the decedent will ever be required to pay any amount in satisfaction of such claim, it is held that the deduction claimed in the return is not an allowable deduction under section 812(b)(3) of the Internal Revenue Code, since the estate need suffer no loss, because any payment required to be made by the executors would immediately be compensated by the accompanying rights of subrogation against the corporation primarily liable and contribution from the other endorser and guarantor”.

The matter was tried before the United States Tax Court in San Francisco and the Tax Court has rendered its findings and decision herein holding that the claim was not deductible.

In its opinion, the Tax Court erroneously concludes that there was no default in the notes or other event “fixing the liability of the guarantor”,

disregards the undisputed evidence showing the condition under which the consent to distribution was requested and given, viz.—that the estate would be distributed to the trustee, subject to the claim, holds that the bank “had abandoned its claim and relinquished its rights”, that the “purported approval of the claim by the court was a vain and ineffectual action of no [32] legal standing or binding effect”, that there was “no valid or bona fide claim outstanding on the part of the bank and no basis for a deduction from the gross estate”, that the approval of petitioners’ contention “would lead to absurd ends”, that the “liability does not attain to the dignity of a potential claim” and that there “is no claim at all”, that the claim was not “enforceable against the estate”, all as more particularly shown in the following Specification of Errors.

As a result, the Tax Court affirmed the asserted deficiency in the sum of \$48,214.31.

The petitioners, at the trial, offered evidence to prove that alleged “rights over” (i.e. alleged rights of contribution, subrogation and reimbursement) had no fair market value and the objection to the testimony was sustained, although such evidence is the crucial point for determining the deductability of a claim such as this.

3.

ASSIGNMENT OF ERRORS

Petitioners and the estate of said decedent being aggrieved by certain findings of fact not supported by substantial evidence in the record and by certain

of the conclusions of law, set forth in the decision of the Tax Court, which findings, opinion and decision they hold do not have warrant in the record and a reasonable basis in the law, desire to obtain a review of the decision by the United States Circuit Court of Appeals for the Ninth Circuit. [33]

Wherefore, petitioners pray that the United States Circuit Court of Appeals for the Ninth Circuit may review said findings of fact and opinion and decision of the Tax Court of the United States and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

March 15, 1945.

M. W. DOBRZENSKY

JAMES H. ANGLIM

Counsel for Petitioners on
Review [35]

State of California,
County of Alameda—ss.

M. W. Dobrzensky, being first duly sworn, deposes and says that he is one of the counsel of record for petitioners in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

M. W. DOBRZENSKY

Subscribed and sworn to before me this 15th day of March, 1945.

[Seal]

ELEANOR DALL

Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed T.C.U.S. Mar. 23, 1945. [36]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENT OF POINTS

Comes now the Estate of Ethel M. DuVal, deceased, by Thomas M. Robinson, Jr. and Weston Shattuck Robinson, as executors of her last will and testament, the petitioners on review herein, by and through their attorneys, M. W. Dobrzensky and James H. Anglim, and hereby assert the following errors on which they intend to rely in this review:

1. The Tax Court erred in holding that decedent's direct and primary liability on the absolute and unconditional guaranty could not form the basis for a claim deductible from decedent's gross estate under I.R.C. Section 812(b)(3).

2. The Tax Court erred in treating decedent's primary liability on the absolute and unconditional guaranty as less than a "potential claim" and in denying deductibility of the claim on that account and because of the solvency of the maker and co-guarantor of the notes.

3. The Tax Court erred in arbitrarily rejecting testimony offered by petitioners to prove that alleged "rights over" (i.e. alleged rights of contri-

bution, subrogation and reimbursement) had no fair market value on the date of decedent's death.

[37]

4. The Tax Court erred in arbitrarily and capriciously making a partial finding of fact that conveys the erroneous idea that a plan for distributing decedent's estate has been abandoned, which partial finding is contrary to the undisputed evidence.

5. The Tax Court erred in arbitrarily and capriciously failing to find the facts and circumstances and conditions under which the testamentary trustee requested and the bank gave its consent to distribution, which facts, circumstances, and conditions are shown by the undisputed evidence.

6. The Tax Court erred in construing the legal effect of the consent to distribution as a waiver of the bank's claim and as a relinquishment of its rights, disregarding the facts, circumstances and conditions under which it was requested and given.

7. The Tax Court erred in concluding that the approval of the bank's claim by the Probate Judge "was a vain and ineffectual action of no legal standing or binding effect."

8. The Tax Court erred in concluding, contrary to law, that the approval of petitioners' contention "would lead to absurd ends", thus invading the province of the Congress, which should act if the law is unwise or requires change.

Dated March 15, 1945.

M. W. DOBRZENSKY

JAMES H. ANGLIM

Counsel for Petitioners on
Review

Service of the within Statement of Points is hereby admitted March 23, 1945.

J. P. WENCHEL SLY

Chief Counsel, Bureau of Internal Revenue.

Attorney for Respondent on Review

[Endorsed]: Filed T.C.U.S. Mar. 23, 1945. [38]

[Title of Tax Court and Cause.]

NOTICE OF FILING OF PETITION
FOR REVIEW

To John P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

Please Take Notice that on March 23, 1945, petitioners filed with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the above entitled Court heretofore rendered in the above entitled cause. A copy of (1) the Petition for Review and the assignment of errors, together with a copy of each of (2) Designation for Record on Review, and (3) Statement of Points, all as filed [39] herein are delivered herewith and served upon you.

Dated March 23, 1945.

M. W. DOBRZENSKY

JAMES H. ANGLIM

Attorneys for Petitioners

Personal service of the foregoing notice, together with receipt of copies of the (1) Petition for Review, (2) Designation of Record on Review and (3) Statement of Points therein mentioned, is hereby acknowledged.

March 23, 1945.

J. P. WENCHEL SLY

Chief Counsel, Bureau of Internal Revenue.

Counsel for Respondent.

[Endorsed]: Filed T.C.U.S. Mar. 23, 1945. [40]

[Title of Tax Court and Cause.]

PROCEEDINGS

Date September 18, 1944.

THOMAS M. ROBINSON, JR.,

called as a witness on behalf of the Petitioner, testified as follows:

Direct Examination [41a]

Q. Now Mr. Robinson, I show you Petitioner's Exhibit No. 2, the claim of the Bank of America. Are you familiar with that claim?

A. (Examining document.) Yes, I am.

Q. And you are the Thomas M. Robinson whose approval is endorsed thereon on the first day of July, 1942?

A. Yes, sir.

Q. Are you familiar with the promissory notes that are part of that exhibit?

A. I am.

Q. And with the endorsements and guarantees that appear on the reverse thereon?

A. Yes, I am.

Q. And were those notes guaranteed by Ethel M. DuVal and Mary J. Robinson?

A. Yes. They were asked by the bank to do it.

Mr. Dobrzensky: That is all. [41]

Mr. Dobrzensky: I will call R. W. Kattrelle.

Whereupon,

R. W. KATTRELLE,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Please state your name.

The Witness: R. W. Kattrelle—K-a-t-t-r-e-l-l-e. [42]

Mr. Dobtzensky: I desire to qualify this witness as an expert appraiser.

By Mr. Dobrzensky:

Q. What is your business?

A. I am a real estate broker and appraiser.

Q. How long have you been engaged in that business?

A. Thirty-eight years, a little over.

Q. Are you at the present time employed in the capacity as an appraiser for any concern or concerns?

(Testimony of R. W. Kattrelle.)

A. I am the appraiser for the Central Bank of Oakland, and have been for the last 17 years; and for the First Federal Savings, Alameda Federal Savings, Connecticut Mutual Life Insurance Company, and quite a few others.

Q. As such an appraiser do you appraise real property? A. Yes.

Q. Do you appraise personal property?

A. Yes.

Q. Tangible personal property?

A. Yes, sir.

Q. Intangible personal property?

A. Yes, sir.

Q. Have you had occasion, during the period you have indicated, to testify in court as an expert appraiser? A. Yes, sir.

Q. For all of those types of property? [43]

A. Yes.

Q. In what courts have you testified as an expert appraiser?

A. Well, the Alameda County Courts, the Federal Court here in San Francisco, and the local courts across the Bay, Superior Court, and so forth.

Q. Now, you have examined the claim, the bank's claim, which is Petitioner's Exhibit 2 in this case? A. Yes, sir.

Q. And the promissory notes that are attached thereto? A. That is right.

Q. And the contracts of guaranty that have been endorsed thereon? A. Yes, sir.

(Testimony of R. W. Kattrelle.)

Q. And you are familiar with the rights of the parties? A. Yes.

Mr. Dobrzensky: We submit that this witness, your Honor, is a qualified appraiser.

The Court: Please rise when you address the court.

Mr. Dobrzensky: Pardon me, your Honor.

The Court: Have you any objection?

Mr. Murray: No, I have no objection. I admit that he is a qualified appraiser of real property and——

The Court: That is all we need at the present time. [44]

Mr. Dobrzensky: And personal property, too.

The Court: Proceed with your questions.

Mr. Murray: As a matter of fact, I would like to have that question read back, if you would, because he stated that sitting down. Did you ask him a question yet?

Mr. Dobrzensky: Only to qualify him as a witness.

Mr. Murray: I will admit he is a qualified real estate appraiser, if that is what he is asking.

The Court: You may proceed.

Mr. Dobrzensky: The first question is a hypothetical question.

By Mr. Dobrzensky:

Q. Ethel M. DuVal, who died April 9, 1942, in her lifetime, with her sister, Mary J. Robinson, endorsed and guaranteed certain promissory notes for

(Testimony of R. W. Kattrelle.)

M. K. Blake Estate Company, in favor of Bank of America, National Trust & Savings Association, for the principal balance of \$175,000 payable August 2, 1944, and interest thereon at the rate of $4\frac{1}{2}$ per cent ($4\frac{1}{2}\%$) per annum, which said principal balance remains unpaid and if Ethel M. DuVal's estate is required to pay the entire amount of said notes at some indeterminate time after April 9, 1942, it will, after making such payment, then be entitled to a right of contribution against Mary J. Robinson, if Mary J. Robinson is then alive (or against her estate if she is then deceased and if the time for filing claims against [45] her estate has not expired), which right of contribution would be a right to recover from Mary J. Robinson or her estate to the extent of one-half of the amount of said indebtedness paid by the Ethel M. DuVal estate. What, if anything, on the date of Ethel M. DuVal's death on April 9, 1942, was the fair market value of her estate's said right of contribution which would arise upon such payment being made by such estate at some indeterminate time after April 9, 1942, that is to say, at what price, if any, would such right of contribution have changed hands on April 9, 1942 between a willing seller and a willing buyer thereof, neither being under any compulsion to sell or to buy?

Mr. Murray: I would like to object to that question on a couple of grounds, if your Honor please. In the first place, I submit that this witness is not

(Testimony of R. W. Kattrelle.)

qualified to answer that question because it, in turn, involves a legal principle, and to which this man has shown no qualifications.

I object otherwise on the basis that this question is incompetent, irrelevant and immaterial.

I think I will leave my objection there.

Mr. Dobrzensky: May it please the Court, it very frequently has arisen in cases before the United States Tax Court, when they are reviewed, that the upper court has said that there is no evidence upon a particular point, and we feel that if there is to be a value of any sort attached to the [46] alleged accompanying rights of contribution and subrogation, which are set forth in the 90-day letter of the Commissioner, we are entitled to show by a hypothetical question, setting forth the facts and conditions as we deem them to exist, to an expert witness that the alleged right of contribution had no market value as of that date, and that it is competent for us to show by this witness, who has testified that he has appraised real and personal property, tangible and intangible property, what value, if any, this right of recovery that the paying guarantor might have against his co-guarantor, as of the vital date, April 9, 1942, the date of the death of decedent.

We submit it is proper to receive such evidence and that the question is not argumentative, but sets forth all of the facts and circumstances upon which an evaluation could be predicated.

The Court: I sustain the objection.

(Testimony of R. W. Kattrelle.)

Mr. Dobrzensky: At this time, may it please the Court I offer to prove by the testimony of this witness on the stand, in answer to this question, that the answer to the question would be that the right of contribution would have no market value.

The Court: Very well.

Mr. Dobrzensky: Now, I have similar questions, may it please the Court, with reference to the alleged right [47] of subrogation and the alleged right of reimbursement and, if I may, I would like to read them.

The Court: We will recess until 2:00 this afternoon.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [48]

Afternoon Session

Whereupon,

R. W. KATTRELLE

resumed his testimony as follows:

Direct Examination—(Resumed)

Mr. Dobrzensky: Just before the noon recess your Honor sustained the objection to the hypothetical question which was asked the witness with respect to the alleged right of contribution.

Would it be too much to ask your Honor, on which of the grounds the objection was sustained?

The Court: Let the record stand as it is.

By Mr. Dobrzensky:

(Testimony of R. W. Kattrelle.)

Q. Mr. Kattrelle—this question, your Honor, refers to subrogation.

Ethel M. DuVal, who died on April 9, 1942, in her lifetime, with her sister, Mary J. Robinson, endorsed and guaranteed certain promissory—

May I reserve an exception to your Honor's ruling in the record?

The Court: You may.

By Mr. Dobrzensky:

Q. Resuming the question—certain promissory notes for M. K. Blake Estate Company, in favor of Bank of America, N. T. & S. A., in the principal balance of \$175,000 payable [49] August 2, 1944, and interest thereon at the rate of four and one-half per cent ($4\frac{1}{2}\%$) per annum, which said principal balance remains unpaid and, if Ethel M. DuVal's estate is required to pay the entire amount of said notes at some indeterminate time after April 9, 1942, it will, after making such payment, then be entitled to a right of subrogation, that is to say, a right by means of a civil action to have and enforce any security which said bank or the holder of said notes had at the time of such payment thereof by the estate, which said right of subrogation is not a tangible right of such a nature and character that it can be seized or held or enjoyed independently of a judicial proceeding. What, if anything, on the date of Ethel M. Duval's death on April 9, 1942, was the fair market value of said estate's right of subrogation which would arise upon such payment

(Testimony of R. W. Kattrelle.)

being made by said estate at some indeterminate time after April 9, 1942, that is to say, at which price, if any, would such right of subrogation have changed hands on April 9, 1942, between a willing seller and a willing buyer thereof, neither being under any compulsion to sell or to buy?

Mr. Murray: Same objection, if your Honor please.

The Court: I sustain the objection.

Mr. Dobrzensky: An exception, please.

Now, I offer by this witness on the stand, your Honor, to prove that in answer to this question his testimony would be that such right had no fair market value on April 9, [50] 1942.

By Mr. Dobrzensky:

Q. The third question:

Ethel M. DuVal, who died on April 9, 1942, in her lifetime, with her sister, Mary J. Robinson, endorsed and guaranteed certain promissory notes for M. K. Blake Estate Company, in favor of Bank of America, N. T. & S. A., in the principal balance of \$175,000, payable August 2, 1944, and interest thereon at the rate of four and one-half per cent ($4\frac{1}{2}\%$) per annum, which said principal balance remains unpaid and, if Ethel M. DuVal's estate is required to pay the entire amount of said notes at some indeterminate time after April 9, 1942, it will, after making such payment, then be entitled to a right of reimbursement against the M. K. Blake Estate Company, that is to say, a right

(Testimony of R. W. Kattrelle.)

to recover from the M. K. Blake Estate Company the full amount paid on its said notes to the holder thereof. What, if anything, on the date of Ethel M. DuVal's death on April 9, 1942, was the fair market value of said right of reimbursement which would arise upon such payment being made by said estate at some indeterminate time after April 9, 1942, that is to say, at what price, if any, would the right of reimbursement have changed hands on April 9, 1942, between a willing seller and a willing buyer thereof, neither being under any compulsion to sell or to buy?

Mr. Murray: Same objection [51]

The Court: I sustain the objection.

Mr. Dobzensky: Note an exception.

Now, we offer by this witness on the stand, your Honor, to prove that, in answer to the question on which your Honor has just ruled, that the testimony would be, in answer thereto, that the right of reimbursement would have no fair market value.

That is the case for the Petitioner, your Honor.

Mr. Murray: If your Honor please, the Respondent's case consists of an offer of——

The Court: Is there any cross examination of this witness?

Mr. Murray: No cross examination.

The Court: You are excused.

(Witness excused.)

Mr. Murray: The Respondent's case consists of an offer of a couple of more documents and some oral stipulations by counsel.

I have no witnesses. [52]

M. W. DOBRZENSKY,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Anglim:

Q. Mr. Dobrzensky, you are the M. W. Dobrzensky who certified to the Federal Estate Tax Return in this matter as one of the attorneys for the Executors, are you not? A. I am.

Q. You are also the M. W. Dobrzensky named in the will of the decedent, the residuary devisee and legatee in trust? A. I am.

Q. I show you the letter dated March 17, 1943, from A. E. Caldwell, Vice President of the Bank of America National Trust and Savings Association, addressed to you, this being Respondent's Exhibit "D". I ask you, Mr. Dobrzensky, did you receive that letter and enclosures therein mentioned?

A. I did.

Q. Did you know Mr. Caldwell prior to the time you received this letter?

A. I did.

Q. How long had you known him?

A. Oh, I would say 20 to 22 years.

Q. This letter states "In accordance with your request" this Consent to Distribution is being sent to you. Did you request Mr. Caldwell to send the Consent to Distribution to you? A. I did.

Q. Was that request oral or in writing?

A. It was oral.

(Testimony of M. W. Dobrzensky.)

Q. When did it occur?

A. On the 15th day of March, 1943.

Q. What conversation did you have with him on that day?

Mr. Murray: I object to that, if your Honor please, as being irrelevant and immaterial to this case. The document speaks for itself and what other conversations took place, I submit, are irrelevant and immaterial.

Mr. Anglim: I submit it is material to the issues here involved because the Respondent is contending that this Consent to Distribution is something equivalent to a waiver of the claim. I want to show the circumstances under which the Consent to Distribution was given.

The Court: He may answer.

The Witness: Will you read the question, Mr. [54] Reporter?

(The question was read by the reporter.)

Mr. Murray: May I have an exception?

The Court: Yes.

A. I called Mr. Caldwell on the telephone on the 15th of March and re-called his attention to the fact that the Bank, Bank of America, had filed a claim for \$175,000 in the Estate of Ethel M. DuVal, deceased. I told him that the claim had been allowed by the Executors and would shortly be presented to the court for approval, and that when it was allowed and approved the estate could not be distributed without the consent of the Bank. I told him

(Testimony of M. W. Dobrzensky.)

that, as he had known, I was the residuary legatee named in Mrs. DuVal's will to whom the estate would be distributed in trust and that our plan was to distribute the estate in trust subject to the Bank's claim. I asked him if, on that basis, the Bank would consent to distribution.

He said that he believed it would, and would let me know in the next day or two.

On the 17th of March, or the day following, I received the letter counsel showed me, enclosing the Consent to Distribution and the Withdrawal of Special Notice.

Mr. Murray: I move that that be stricken as irrelevant and immaterial. On the face of it it appears that the witness is attempting to say that the reason this claim [55] was so forgiven, I say claim, was because somebody else was going to assume it. I submit that is wholly irrelevant and immaterial to this issue.

The Court: Motion denied.

By Mr. Anglim:

Q. Prior to this conversation that you had with Mr. Caldwell, did you have a conversation with the Executors relative to a plan for the distribution of the estate? A. I did.

Q. When did that conversation occur?

A. I would say some time shortly prior to my conversation with Mr. Caldwell on the 15th, somewhere within a week before.

Q. Was a plan for the distribution of the estate thereupon agreed upon, or was a plan worked out?

(Testimony of M. W. Dobrzensky.)

A. Yes.

Q. What was that plan?

Mr. Murray: I would like to make the same objection to that question if your Honor please, as I did to the former question. It is wholly irrelevant and immaterial to this issue.

The Court: How is that related—is this the plan that was followed?

Mr. Anglim: Correct. I am merely attempting to show the natural progression of events there, that is, a conversa- [56] tion with the Executors by which a plan was worked out for the distribution of this estate, subject to the claim, if the consent of the Bank of America be obtained therefor.

The Court: He may answer.

The Witness: Will you read the question, please?

(The question was read by the reporter.)

A. The plan was that the entire residue and remainder of the estate of Ethel M. DuVal, deceased, should be distributed to me under the will as trustee of the trust named therein, subject to the payment of the claim of the Bank of America in the sum of \$175,000, based on the guarantees.

By Mr. Anglim:

Q. Mr. Dobrzensky, was any written record of this agreed plan of distribution ever made?

A. A letter which I addressed to the Executors confirming the plan on the 25th of March, 1943.

Mr. Anglim: I think that is all.

(Testimony of M. W. Dobrzensky.)

Cross Examination

By Mr. Murray:

Q. This plan that you speak of, Mr. Dobrzensky, has never been carried out, has it?

A. No. The estate has not yet been distributed, but the plan is still in existence and that is the way we will distribute the estate.

Q. I understood counsel to state that this was the plan [57] that was carried out. There has been no carrying out of anything, has there?

A. The estate has not yet been distributed, correct, but it will be distributed according to the plan.

Mr. Murray: If your Honor please, I renew my objection and ask that it be stricken as not being relevant or material in this case.

The Court: I myself interpreted counsel's statement the same as indicated.

Mr. Anglim: I didn't indicate that the estate had been distributed.

The Court: You said the plan had been carried out.

Mr. Anglim: I don't think the record will disclose that. If that is a fact I didn't intend, so intend the question. I merely wanted to know whether or not the plan had been agreed upon, this particular plan that is indicated in that progression of events, first the conversation with the Executors, then the conversation with Mr. Caldwell, then the Consent to Distribution, the actual Consent to Distribution, and the withdrawal by the Bank of the request for special notice.

(Testimony of M. W. Dobrzensky.)

The Court: I will let the record stand.

By Mr. Murray:

Q. Then, Mr. Dobrzensky, I understand that in accordance with this plan the trust intends to pay this note if the maker of the note doesn't? [58]

A. If called upon by the Bank, and it is in default, yes, the estate will be distributed subject to the plan.

Q. But the trust will pay, if anybody, from income, and the estate will be entirely out of it under this plan?

A. I can't answer the question that way. The estate remains subject to the jurisdiction of the Probate Court after administration and during the period of the trust, so it is still the Estate of Ethel M. DuVal, no longer the estate in the hands of the Executors, but in the hands of the trustee.

Q. But the estate cannot be distributed even to the trustees without this waiver, is that right?

A. That is correct, cannot be distributed without the waiver, rather, the consent to distribution, it is.

Q. I would also like to ask you this: You stated that a claim was filed by the Bank. With whom was the claim filed?

A. It was filed with the Executors, care of ourselves as attorneys. If you will look at the Notice to Creditors, which I think is our first exhibit, you will note that Notice to Creditors does direct that the claim shall be filed either with the County Clerk, or left at the offices of their attorneys, at

(Testimony of M. W. Dobrzensky.)

1516 Central Bank Building, and the claim was mailed directly to us at our office.

Q. You mean the attorneys for the estate?

A. Yes.

Q. The release that you received from the Bank on March [59] 16 or 17, 1943, was that the——

A. (Interposing) It was received, I think, on the same day, or the day after the 17th or 18th of March, 1943,

Q. Then that release was in your hands before you presented the claim to the court for approval?

A. That Consent to Distribution was in my hands.

Q. These documents that are in evidence then were in your hands before you even placed the claim before the court for approval?

A. That is correct.

Mr. Murray: That is all.

The Court: You may be excused. [60]

EXHIBIT B

Cable Address—Bamerical

13044

Bank of America

National Trust and Savings Association

Oakland Main Office

Oakland, California

March 17, 1943

Mr. M. W. Dobrzensky
Fitzgerald, Abbot & Beardsley
Central Bank Building
Oakland, California

In re: Ethel M. Du Val Estate

Dear Mr. Dobrzensky:

In accordance with your request, we are enclosing Consent to Distribution in the above named estate, reserving our claim, however, against Mary J. Robinson who is a co-guarantor on the note of M. K. Blake Estate Co.

There is also enclosed a Withdrawal of Request for Special Notice of proceedings.

Yours very truly,

A. E. CALDWELL

A. E. Caldwell

Vice President

AEC:g

Enclosures 2

#23376 [61]

EXHIBIT 8

April 17, '42.

I, Ethel M. Du Val, of the City of Oakland, County of Alameda, State of California, make my will as follows:

First: I hereby revoke all former wills by me made.

Second: (A) I give, devise and bequeath unto my niece, Ethel Robinson, if she be living at the time of my death, my residence at 315 Lenox Avenue, Oakland, California, together with the contents thereof (except library and books) including all furniture, furnishings, china, silverware, linens, rugs, pictures and all other items.

(B) I give, devise and bequeath unto my nephew, John Weston Havens, Jr., if he be living at the time of my death, all books situated in the library in my home at 315 Lenox Avenue, Oakland, California. I make no other or further provision herein for my said nephew, John Weston Havens, Jr., for the reason that he has been amply provided for by his late father who was my brother.

Third: If my husband, William M. Du Val, and my sister, Mary J. Robinson, or either of them, be living at the time of my death, I hereby give, devise and bequeath all of the rest, residue and remainder of my property of every kind and character and wheresoever situate, unto M. W. Dobrzensky, to have and to hold the same, in trust, nevertheless, for the following uses and purposes and upon the terms and conditions hereinafter set forth:

(1) The trustee during the existence of this

trust and to enable it to properly execute this trust, shall have full power to do each and all of the following things: To possess, manage, control, grant, sell, convey, partition, assign, transfer, lease for terms either within or extending beyond the duration of this trust, repair, alter, improve, exchange, [62] rent, mortgage, encumber, pledge, divide, subdivide, said trust property or any part or parcel thereof as to it may seem best; to hold and maintain any and all property and securities so received by it in trust or that may become a part of this trust during the existence thereof whether or not the same be legal for investment of trust funds in California or any other state; to receive all rents, profits and income from each and every part of the trust estate; to collect all income from whatever sources; to sell upon deferred payments; to borrow money for any trust purpose upon such terms and conditions as may be determined by the trustee and to obligate the trust estate for the repayment thereof; to create restrictions, easements and other servitudes; to carry such insurance as the trustee may deem advisable; to have respecting bonds or shares of stock or other securities all the rights, powers and privileges of an owner, including the power to give proxies, pay calls, assessments and other sums deemed by the trustee necessary for the protection of the trust estate; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers and liquidations, and in connection therewith to deposit securities with and transfer title to any protective or

other committee under such terms as the trustee may deem advisable, and to receive and retain as an investment herunder any securities received through the exercise of the power of participation therein whether or not such securities are legal for investment of trust funds in California; to exercise or sell stock subscription or conversion rights; to hold with or without disclosure of this trust any securities in bearer form or in the name of the trustee or in the name of any other person and to exercise all of the rights, powers and privileges of an owner thereof through such nominee, but in the event the trustee causes or permits any securities to stand in the name of [63] a nominee the trustee shall be responsible for the acts and omissions of the nominee in respect to such securities to the same extent as if the securities stood in the name of the trustee; to retain during the existence of this trust in its discretion any of the property coming into its possession hereunder in the same form of investment as that in which it was received by the trustee; to commence or defend, whether before or during or after the probate administration of my estate, all actions or suits in law or in equity which the trustee deems should be commenced or defended in order to establish or maintain the validity of this trust or to defend this trust against legal or equitable attack or to preserve or protect any part or all of the trust estate; to enforce or collect by suit or otherwise any and all rights and obligations to which the trust estate is entitled or which shall be or become due or owing in connection with the trust estate; to

employ such attorneys, accountants and tax consultants and other assistants as may be deemed necessary or advisable by the trustee in connection with the administration of this trust; to incur all costs and expenses deemed by the trustee to be necessary or advisable in connection with the administration of this trust; to compromise or arbitrate or otherwise adjust any and all claims in favor of or against the trustee in connection with the trust estate; so make any settlement or compromise of any claim or litigation respecting any property or rights of the trust estate or pertaining to this trust; to budget the estimated annual income in order to equalize so far as practicable the periodical income payments to the beneficiary entitled to the same; to loan and reloan; invest and reinvest, each and every part of the trust estate in such property as may be legal for the investment [64] of trust funds under the laws of the State of California in existence at the time the investment is made; to determine in its discretion what is principal and what is income of the trust estate and what items shall be charged or credited to either except that in the event the trustee acquires any bonds, notes or other securities at a premium, that is, at a price or prices higher than face or par value thereof, the trustee shall amortize the premium paid for each such security from the interest and dividends or other income therefrom so as to restore the amount of such premium to the principal of the trust estate and except that all dividends paid by a corporation in its own shares of the same kind or rank as the stock upon which such

dividend is paid, and all stock subscription rights and amounts received upon the sale of such rights, and all liquidating dividends and all distributions from capital which the paying corporation states in writing delivered to the trustee to be such prior to the trustee's disbursement thereof, shall become a part of the principal of the trust estate and except that any income that my executor may receive upon my estate after my death that is distributed to the trustee shall constitute a part of the principal of the trust estate and shall be managed and disposed of by the trustee as a part of the principal of the trust estate; the enumeration of the foregoing powers of the trustee shall not limit its general powers, it being my intention to confer upon the trustee in the exercise of this trust all of the rights, powers and privileges which an absolute owner of the same property would have, save and except as aforesaid.

(2) The trustee from the gross income derived from the trust estate, or from the principal of the trust estate if the trustee deems that advisable, shall first pay as and [65] when due all taxes and assessments levied or assessed against any of the assets of the trust estate or against this trust (including all income taxes in connection with the trust that the trustee is required by law to pay) and all expenses of every kind or nature expended or incurred in the care, management or protection of the trust estate and of this trust and in the defense of this trust against legal or equitable attack either before or after the probate administration of my estate, and

also a reasonable compensation for the services of the trustee hereunder.

(3) Two hundred fifty dollars (\$250.00) of the net income derived from the trust estate shall be by the trustee paid monthly to my husband, William M. Du Val, so long as he shall live and the remainder of the net income, if any, shall be paid in convenient installments not less often than quarterly unto my sister, Mary J. Robinson, for and during the period of her life; the payment of income to my sister, Mary J. Robinson, herein provided for to be subject to the provisions of paragraph (7) of this division Third of my will.

(4) This trust shall continue during the lifetime of my husband, William M. Du Val, and my sister, Mary J. Robinson, and shall terminate upon the death of the last survivor of them.

(5) Upon the termination of this trust the entire trust estate then remaining in the hands of the trustee shall go to and be by the trustee paid, conveyed and transferred and delivered as follows: In equal shares to Ethel Robinson, Florence Robinson Dodge, Weston Shattuck Robinson and Thomas Maury Robinson, they being the four surviving children of my sister, Mary J. Robinson; provided, however, that if any of the said children of my sister, Mary J. Robinson, shall have [66] died prior to the termination of said trust leaving lineal descendants, then the share of such deceased child shall go to such lineal descendants share and share alike; and if any of said children of said Mary J. Robinson shall have died prior to the termination of said

trust without leaving any lineal descendants, then the share of said deceased child shall go to the other said children of said Mary J. Robinson, living at the time of the termination of said trust, and to the descendants of any deceased child, share and share alike, per stirpes and not per capita.

(6) Each and every beneficiary under this trust is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in other manner affect or impair his or her beneficial or legal right, title, interest, claim or estate in or to the income and principal or income or principal of this trust during the entire existence thereof, nor shall the right title, interest or estate of any beneficiary herein be subject to the rights or claims of creditors of said beneficiary nor subject nor liable to any process of law or court, nor subject to any bankruptcy proceedings of any kind, and all of the income, profits and principal under this trust shall be transferable, payable and deliverable only and solely to the beneficiaries entitled to take the same under the terms of this trust or their legal guardian.

(7) If in the opinion of the trustee the \$250.00 per month herein directed to be paid to my husband, William M. Du Val, is not sufficient to provide him with his reasonable needs during any period of illness or other emergency, the trustee is authorized as often as the trustee shall deem it necessary to pay to or use or expend for the use and benefit of my said husband [67] up to the remainder of the net income of the trust estate as the trustee in his sole

judgment and discretion shall deem necessary for such purpose or purposes.

(8) It is an express provision of this trust that it must continue for the full duration of the term stated herein and it shall in no event be terminated prior thereto by any legal proceeding or otherwise.

(9) No bond shall be required of my said trustee.

Fourth: In the event that neither my husband, William M. Du Val, nor my sister, Mary J. Robinson, shall be living at the time of my death, I give, devise and bequeath all of the rest, residue and remainder of my property of every kind and character and wheresoever situate unto the four surviving children of my sister, Mary J. Robinson, namely: Ethel Robinson, Florence Robinson Dodge, Weston Shattuck Robinson and Thomas Maury Robinson, share and share alike; provided, however, that if any of the said children of my sister, Mary J. Robinson, shall have died prior to the time of my death, leaving lineal descendants, then the share of such deceased child shall go to such lineal descendants share and share alike; and if any of said children of said Mary J. Robinson shall have died prior to the time of my death without leaving any lineal descendants, then the share of the said deceased child shall go to the other said children of said Mary J. Robinson living at the time of my death and to the descendants of any deceased child, share and share alike, per stirpes and not per capita.

Fifth: I specifically direct my executor to pay out of the general assets of my estate all taxes, including inheritance taxes and Federal estate taxes

which may be chargeable against my estate or against the gifts, bequests and devises [68] and interests under this will, or against the beneficial interests of the various beneficiaries under this will, including the various beneficiaries of the trust declared in this will, it being my intention that each and every gift, bequest and devise and interest under this will shall be delivered to and taken by every legatee, devisee and beneficiary hereunder in full free from any such taxes and without deduction.

Sixth: If an person or persons, who, if I died wholly or partly intestate, would be entitled to share in my estate, shall in any manner whatsoever directly or indirectly contest this will or oppose or attack or in any manner seek to impair or invalidate any provision of this will, or shall endeavor to succeed to any part of my estate other than through this will, then in each of such cases I hereby bequeath to such person or persons the sum of One Dollar (\$1.00) only.

Seventh: I hereby nominate and appoint Thomas Maury Robinson and Weston Shattuck Robinson, as executors of this, my last will and testament, to serve as such without bonds, and giving my said executors full power and authority to sell and dispose of any and all of my estate at either public or private sale, at such times and for such prices and on such terms as to them may seem best, with or without notice and without any order or authority of any court except such confirmation of their acts as may be required by law.

In Witness Whereof, I have hereunto set my hand this 7th day of May, 1941.

ETHEL M. Du VAL

The foregoing instrument, consisting of seven (7) pages besides this, was at the date thereof, by the said Ethel M. Du Val subscribed and signed and sealed and published as, and declared by her to be, her last will and testament, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed the same as witnesses thereto.

S. RUBENSTEIN

residing at 4407 Edgwood Ave., Oakland, Calif.

HERBERT M. STRACHAN

residing at 6100 Ascot Drive, Oakland, Calif.

The foregoing instrument is a correct copy of the original on file in this office.

Attest: Sept. 7, 1944.

[Seal] G. E. WADE

County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Alameda.

FRANK SCHNEFFLE

Deputy. [69]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies, duly certified as correct, of the following documents and records in the above entitled cause in connection with the petition for review by said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the undersigned:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings before the Tax Court:

(a) Petition, including annexed copy of deficiency notice;

(b) Answer.

3. (a) Findings of Fact and Opinion (promulgated February 2, 1945) and (b) Decision of the Tax Court, entered February 3, 1945.

4. Petition for Review, together with proof of service of notice of filing of Petition for Review and of service of copy thereof.

5. Petitioner's Exhibit No. 8, offered in evidence at the trial before the Tax Court, being a copy of decedent's last will and testament.

6. Testimony (part) of petitioners' witness Thomas M. Robinson commencing with Line 1 of

Page 16 of the Official Record of the Proceedings, to and including Line 17 of Page 16.

7. Testimony of petitioner's witness R. W. Kirtelle, commencing with Line 17 of Page 18 of the Official Record of the Proceedings, continuing to and including Line 14 of Page 28 thereof.

8. Testimony of petitioners' witness, M. W. Dobrzensky, commencing with Line 6 of Page 33, of the Official Record of the Proceedings, continuing to and including Line 12 of Page 40 thereof.

9. Copy of letter dated March 17, 1943, from A. E. Caldwell, Vice President of Bank of America National Trust and Savings Association to M. W. Dobrzensky, attorney for petitioners, appearing at Lines 1 to 8 of Page 29 of the Official Record of the Proceedings, (Respondent's Exhibit B).

10. Statement of Respondent's counsel appearing at Lines 16-19 of page 28 of the Official Record of the Proceedings.

11. Statement of Points. [71]

12. Any and all orders enlarging time for the preparation, transmission and delivery of the record.

13. This Designation for Record.

Dated March 15, 1945.

M. W. DOBRZENSKY

JAMES H. ANGLIM

Counsel for Petitioners on
Review

[Endorsed]: Filed T.C.U.S. Mar. 23, 1945. [72]

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 72, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of April 1945.

[Seal]

B. D. GAMBLE

Clerk, The Tax Court of the
United States

[Endorsed]: No. 11046. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Ethel M. DuVal, Deceased, by Thomas M. Robinson, Jr., and Weston Shattuck Robinson, as Executors of her last will and testament, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed April 23, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 11046

ESTATE OF ETHEL M. DU VAL, Deceased, by
THOMAS M. ROBINSON, Jr., and WESTON
SHATTUCK ROBINSON, as executors of her
last will and testament,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

DESIGNATION FOR RECORD ON REVIEW
AND STATEMENT OF POINTS

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Pursuant to Rule 19(6) of your Court, we hereby
set forth a Statement of Points of Petitioners and a
designation of the parts of the record which we
think necessary for the consideration of the petition
for review of the decision of the Tax Court of the
United States, as follows:

1. Petitioners adopt in full the Statement of
Points filed in the Tax Court of the United States
and transmitted to you as part of the record in the
above entitled matter.

2. Petitioners adopt in full the Designation for
Record on Review filed in the Tax Court of the
United States and transmitted to you as a part of

the record in the above entitled matter, and in addition thereto designates this Designation for Record on Review and Statement of Points as a part of said record.

April 25, 1945.

M. W. DOBRZENSKY

JAMES H. ANGLIM

Attorneys for Petitioners on Review, 1516 Central
Bank Building, Oakland, 12, California

Service of a copy of the within Designation for Record on Review and Statement of Points is hereby admitted this 28 day of April, 1945.

SAMUEL O. CLARK, Jr.

Assistant Attorney General

.....

Attorney for Respondent

[Endorsed]: Filed May 1, 1945. Paul P. O'Brien,
Clerk.